CASES CITED

STATUTES CITED

In the Supreme Court of the United States

OCTOBER TERM, 1942

No. 228

B. C. SCHRAM, Receiver of First National Bank-Detroit, a National Banking Association,

Petitioner,

vs.

JOSEPH L. COYNE

Respondent.

BRIEF FOR RESPONDENT

Appellant claims that the Circuit Court of Appeals erred in not referring this case to the state court for determination, and in affirming the decision of the District Court.

We contend that the decisions and statutes of the State of Michigan fully cover every point involved in this case.

While there is no Michigan decision on all fours with this case, both courts and both parties contended that the matter was determined by Michigan decisions and Michigan statutes. Where there is a four square decision on a question no further litigation arises, or at least should arise, involving it. Both of the lower courts were able to find in the Michigan decisions and statutes sufficient law to decide this case. As appellant stated in his Circuit Court of Appeals brief, "the Supreme Court of Michigan has

established certain fundamental principles which must be considered in determining the scope and effect of the limitations statute."

The appellant at no time prior to his petition for writ of certiorari has raised the point that the question was undecided by decisions of and not controlled by statutes of the State of Michigan by reason of which the Federal Court should have referred the case to the state court, and we believe it is too late to raise the point now.

> "It is not incumbent on the court to consider errors not assigned in the trial court, nor considered in the Circuit Court of Appeals, but first appearing in the petition for writ of certiorari." *Saltonstall vs. Birtwell,* 164 U. S. 54; 17 S. Ct. 19; 41 L. Ed. 348.
>
> "Supreme Court, on certiorari, would not discuss petitioner's contentions which he failed to assign as error in Circuit Court of Appeals." *Sonzinsky vs. U. S.,* 57 S. Ct. 554; 300 U. S. 506; 81 L. Ed. 772.
>
> "The Supreme Court has refused to consider a question which was not raised in the record; * * * and which was not considered by the court below." *Waterloo Distilling Corporation vs. U. S.,* 51 S. Ct. 282; 282 U. S. 577; 75 L. Ed. 558.
>
> "Supreme Court, in reviewing decision of Circuit Court of Appeals in revenue case on certiorari, will not determine issue not considered below." *Burnet vs. Commonwealth Improvement Co.,* 53 S. Ct. 198; 287 U. S. 415; 77 L. Ed. 1139.

As a matter of fact the appellant, in the lower courts, contended that the Federal court had jurisdiction and should decide the case. On page 10 of his Circuit Court of Appeals brief he said, "While no case decided by the Michigan courts has been found which passes upon the precise question involved here, well-settled principles of state law applied by the courts of Michigan lead to but one conclusion * * *," and cited the case of *Maryland Casualty*

Company vs. Cassetty et al, 119 F. (2d) 602, which held that (quoting from syllabus), "Where there were no state court decisions exactly in point on question of coverage of automobile liability policy, the Circuit Court of Appeals exercised its independent judgment in determining the law with respect to issues presented, based upon whatever principles of state law were applicable."

The following quotations from the opinion of the District Court (R. 34-38) show that the court relied upon the statutes and decisions of Michigan in arriving at its decision:

> "The only real question is whether the action is barred by the six or ten year limit placed upon actions by the statute of limitations of the State of Michigan (R. 34). * * *
>
> "Both parties rely upon Section 13976 C. L. 1929, being 27.605 Michigan Statutes Annotated, * * * (R. 35).
>
> "It is significant also that in the Savage case [*Guardian Depositors Corporation of Detroit vs. Savage*, 287 Mich. 193] reference is made by the court to Wisconsin law and upon reading the Wisconsin decision of *Bishop vs. Douglass*, 25 Wis. 696, we find a case on all fours with the present one (R. 36).
>
> "* * * it is undoubtedly the purpose of the Michigan statute and decisions to differentiate between the period during which action may be brought on a covenant under seal — extended by statute to ten years—and one where the contract is not under seal —a simple contract—where the statute of limitations runs for six years. (R. 37).
>
> "* * * Michigan seems to follow the special reasoning and great weight of authorities which indicate that an agreement by a grantee in a deed to assume an outstanding debt such as a mortgage by accepting a deed with a clause of assumption therein, is just a simple contract and not a special covenant such as

to extend the grantee's obligation to the statute of limitations' provision of ten years" (R. 38).

The fifth and main defense alleged in defendant's answer was based upon a Michigan statute; namely, the Michigan Statute of Limitations (R. 21). The sixth defense of the defendant was also based upon a Michigan statute, but both courts took the view that the defendant was entitled to a judgment on the basis of the limitations statute, so there was no necessity for considering the other defenses. The defendant also relied on Section 13281, Compiled Laws of 1929, 26.524 Annotated Statutes, which provides that no covenant shall be implied in any conveyance of real estate, and on Section 13282, Compiled Laws of 1929, 26.525 Annotated Statutes, which provides that no mortgage shall be construed as implying a covenant for the payment of the sum thereby intended to be secured.

While the Circuit Court of Appeals said that whether acceptance by a grantee of a deed from a mortgagor containing the grantee's assumption of the mortgage renders the grantee liable to the mortgagee on the covenant or a simple contract is a question that has not been decided by the Michigan courts, it proceeded to show that the basic principles involved were fully set forth in Michigan decisions and statutes and that by reason of these the grantee would not be liable on a covenant.

It relied upon the Michigan statute of limitations (R. 46). It said that a question involved was whether there was still a distinction between a contract and a covenant, and quoted from a recent Michigan case, *Guardian Depositors Corporation vs. Savage,* 287 Mich. 193, to show that the distinction is still observed in Michigan (R. 48). The appellant had relied and still does rely on the case of *Crawford vs. Edwards,* 33 Mich. 354, and the Circuit Court of Appeals points out why that case is not controlling (R. 48) and that the subsequent case of *Howe vs. Lemon,* 37

Mich. 164, dealt more closely with the general proposition involved (R. 50-1). It pointed out that Michigan decisions indicate that the distinction between covenants and simple contracts are closely adhered to in considering liabilities on foreclosure (R. 52).

It cited *Frank vs. Applebaum*, 270 Mich. 402, to show that the only covenant involved here was the covenant of the mortgagor and not that of the grantee (R. 52). It pointed out that cases that held the grantee liable as a covenantor hold that the acceptance of the deed is in the *nature* of a covenant; or that it is *equivalent* to a covenant; or that the grantee is liable as completely as though he had signed the agreement, whereas the cases that hold the liability of the grantee is one only of simple contract hold that the fundamental requisite of a covenant is that it be signed and sealed (R. 53). (Italics ours.) The court had cited the Michigan case of *Guardian Depositors Corporation vs. Savage*, 287 Mich. 193, to show that in Michigan a covenant must be signed and sealed (R. 48), and cited Michigan statutes that held covenants could not be implied in deeds or mortgages in Michigan (R. 51, 54).

We therefore respectfully submit that there are applicable Michigan statutes and controlling Michigan decisions covering the point raised and that the lower courts should not have referred the question for decision to the state courts of Michigan, especially since the appellant did not make such a request or raise this issue in the lower courts.

UNDER MICHIGAN DECISIONS AND STATUTES AN ACTION TO COLLECT A MORTGAGE DEFICIENCY FROM THE MORTGAGOR'S GRANTEE WHO ASSUMED AND AGREED TO PAY THE MORTGAGE MUST BE BROUGHT WITHIN SIX YEARS.

The two opinions of the lower courts show that under Michigan decisions and statutes an action at law to collect a deficiency from a grantee who assumed the mortgage must be brought within six years. The two courts analyzed and discussed all of the cases being relied upon by the appellant and told why they were not applicable or controlling.

Under the Michigan statute of limitations all actions must be brought within six years *except* actions founded upon covenants in deeds and mortgages, which may be brought within ten years. Appellant did not bring this action within six years, so he is trying to bring his case within the *exception* to the general six-year limitation.

His action is against Coyne, so he must show that Coyne made a covenant. Coyne neither signed nor sealed any instrument involved (R. 23).

Michigan still recognizes the distinction between an ordinary contract and a covenant.

> "Always a covenant obligation has been considered more solemn and binding than a mere promise in writing *not under seal.*" (Italics ours.) *Guardian Depositors Corporation v. Savage,* 287 Mich. 193.

As pointed out in the decision of the District Court, "Close analysis of the Savage case (supra), however—incidentally a four to three decision — clearly indicates that the entire court continuously had in mind the distinction between liability on the note as such — a simple contract — and liability on the mortgage as such — a special covenant" (R. 36).

At least two different Michigan statutes show that the distinction is clearly kept in mind. It is provided in Section 13281, Compiled Laws of 1929, 26.524 Annotated Statutes, that "no covenant shall be implied in any conveyance of real estate, except oil and gas leases, whether such conveyance contains special covenants or not." This recognizes that a conveyance of real estate may contain both general contracts and covenants. The fact that an agreement is in a deed does not mean that it is a covenant, at least in Michigan.

It is also provided in Section 13282, Compiled Laws of 1929, 26.525 Annotated Statutes, that "no mortgage shall be construed as implying a covenant for the payment of the sum thereby intended to be secured". In other words, in order to claim that a defendant covenants to pay a mortgage debt, there must be an *express covenant* to pay. An implied covenant is not sufficient.

The appellant still puts great stress upon the case of *Crawford vs. Edwards,* 33 Mich. 354. We contend that it is not at all in point because it simply held, as practically all cases from practically all states do, that the acceptance by a grantee of a deed which recites that the grantee assumes and agrees to pay a mortgage makes the grantee liable for the payment. It does not hold that the grantee thereby becomes the covenantor. The quotation on page 17 of petitioner's brief is not from the court's opinion but from a case cited therein. The question of covenants was not involved in the Crawford case, but it was involved in the case of *Howe vs. Lemon,* 37 Mich. 164. The Crawford opinion was rendered in 1876 by Judge Marston, and the other justices were Cooley, Campbell, Graves, and Smith. The Howe case opinion was rendered the following year, 1877, by Chief Justice Cooley, and the other justices were Campbell, Marston, and Graves, and all concurred. In this later case the court said that the agreement to deed to

Mrs. Lemon, the grantee, "Purports to make Mary Jane Lemon covenant for the repayment * * * . It is not, however, signed by her * * * . If she can be held liable it must be on the ground that by accepting the agreement for conveyance of the land to her, she, by implication promised to pay the amount. But it is provided by statute that 'no mortgage shall be construed as implying a covenant for the payment of the sum thereby intended to be secured' which we think is decisive here, the transaction being conceded to be a mortgage".

That statute is still in effect in Michigan as is the statute providing that "no covenant shall be implied in any conveyance of real estate, except oil and gas leases, whether such conveyance contains special covenants or not".

Michigan clearly requires that a covenant be signed and sealed. In *Johnson vs. Hollensworth,* 48 Mich. 140, involving the question of what constituted a covenant, the court said, "There is no fixed or essential form for any covenant; a covenant is merely a promise *under seal.*" (Italics ours). We have previously referred to the Savage case which states that a covenant is a promise in writing under seal. In *Vincent vs. Crane,* 134 Mich. 700, the court said that no particular form of words is necessary to create a covenant in a deed, but it was enough that it was under seal. The court said, "This is an agreement under seal", showing that a seal is deemed essential. The lease involved in that case was signed and sealed by both parties and did contain the word "covenant".

There are at least two United States Supreme Court decisions clearly in point. In the case of *Hale vs. Finch,* 104 U. S. 261, the court held that since the preceding agreement did contain words of covenant and the second one did not, the parties would be assumed to know the distinction and that the second agreement did not constitute a

covenant, so the court said it did not need to consider "whether a covenant upon the part of Finch could arise out of a bill of sale he did not sign, but merely accepted from his vendor". This case involved the sale of a boat.

This case is similar to our own inasmuch as the first instrument, the mortgage, did contain words of covenant and the second instrument, the deed, did not, so far as the grantee was concerned. The deed contained covenants on the part of the grantor and used the word "covenant", (R. 12) but in the assumption clause on which petitioner relies the word "agrees" was used but not the word "covenant".

In the case of *Willard vs. Wood*, 164 U. S. 502, the Supreme Court held that in the District of Columbia the liability of a person by reason of his accepting a conveyance of real estate, subject to a mortgage which he is to assume and pay, is subject to the limitation prescribed as to simple contracts.

Outside of the two above cited United States Supreme Court cases, we have cited in this brief only Michigan decisions and they clearly show that:

1. Michigan still makes a distinction between contracts and covenants,

2. Covenants must be signed and sealed,

3. Covenants cannot be implied in deeds or mortgages, especially a covenant to pay a mortgage debt, and

4. Actions, except on covenants, must be brought within six years.

The appellant is seeking to recover from Coyne upon the ground that he accepted a deed that recited that the premises conveyed were subject to a mortgage "which party of the second part (Coyne) assumes and agrees to pay ac-

cording to its terms and stipulations". (R. 12). The assumption clause does not say that Coyne *covenants* to pay but only that he *agrees* to pay. He did not sign or seal the instrument.

Undoubtedly, a grantee could be made liable over a ten-year period rather than a six-year period by inserting in the deed that he assumes, *covenants,* and agrees to pay the mortgage and then signs and seals the deed thereby making it an indenture rather than a deed poll. Since that was not done in our case, the defendant Coyne can be held only as a contractor and not as a covenantor. There is certainly a distinction between an *agreement* to perform a covenant and a *covenant* to perform a covenant. The only disadvantage that the petitioner in this case has suffered is that he was required to bring this action within six years after the date on which the last payment was made on the mortgage. That is not an unreasonable requirement, and we respectfully submit that the petition for writ of certiorari should be denied.

Respectfully submitted,

HARRY C. BULKLEY,
GLENN D. CURTIS,
Attorneys for Respondent.

BULKLEY, DICKINSON, WRIGHT & DAVIS,
Of Counsel,
3000 Union Guardian Building,
Detroit, Michigan.

Dated: July 30, 1942.